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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 35

UNITED STATES OF AMERICA, PETITIONER

v.

AETNA CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 11-14) is reported at 76 F. Supp. 333. The majority opinion of the United States Court of Appeals for the Second Circuit, and the opinion of Judge Learned Hand, concurring in part (R. 17-22), are reported at 170 F. 2d 469.

JURISDICTION

The judgment of the Court of Appeals was entered November 4, 1948 (R. 23). On January 28, 1949, this Court granted the United States an extension of time to and including March 4, 1949, within which to petition for certiorari (R. 25).

The petition for certiorari was filed March 4, 1949, and was granted April 25, 1949 (R. 27). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the prohibition by R. S. 3477, 31 U. S. C. 203, of the assignment of claims against the United States, may be invoked by the Government to bar recovery of a judgment against it under the Federal Tort Claims Act by an insurance carrier suing in its own name as (a) statutory assignee by state law and (b) equitable assignee by subrogation, of the original claim of an injured person to whom it has paid workmen's compensation benefits pursuant to its contract with his employer.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act,[1] the anti-assignment statute, R. S. 3477, 31 U. S. C. 203, the statutes providing for the counterclaim, 28 U. S. C. 1346 (c), and offset, 31 U. S. C. 71 and 227, of the Government's cross-

[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations herein are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Tort Claims Act.

claims, and Section 29 of the New York Workmen's Compensation Law, are set forth in Appendix A of this brief, *infra* pp. 62-70.

STATEMENT

Peter Vambell, in the course of his employment as a guard and registered mail convoy for the Federal Reserve Bank of New York, was injured on February 8, 1945, on the loading platform of the General Post Office in the Borough of Manhattan, when he was struck by some mail sacks which fell from a conveyor, allegedly through the negligence of the post office employees (R. 2-3). Vambell filed a claim under the New York Workmen's Compensation Law and was awarded compensation for his injury (R. 3). Respondent, Aetna Casualty & Surety Company, the insurance carrier for the Federal Reserve Bank of New York, paid this compensation, together with the medical benefits to which Vambell was entitled (R. 3, 4).

Although the injury could have been made the subject of an action under the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842), Vambell did not bring an action against the United States. Respondent, however, on May 28, 1947, brought this action against the United States under the Tort Claims Act. For a first cause of action, respondent alleged that by operation of the New York Workmen's Compensation Law Vambell's entire cause of action had been assigned to it and sought recovery of $20,000 (R. 3-4). For a second cause of action, respondent

alleged that under its policy with the Federal Reserve Bank it had paid $348.67 for medical treatment to Vambell, for which the Bank as his employer was responsible under the New York Workmen's Compensation Law, and asked judgment for this amount as the subrogee of Vambell and his employer. As to each course of action, it was alleged that "plaintiff [respondent] has been damaged and is entitled to recover" (R. 4).

The United States moved to dismiss the complaint on the grounds that (1) the Tort Claims Act did not authorize the maintenance of an action by a subrogee or assignee of a cause of action thereunder, (2) that the action was barred by R. S. 3477, 31 U. S. C. 203, which prohibits the assignment of claims against the Government before they are allowed, and (3) that the court lacked jurisdiction of the action (R. 5-8). The district court held that R. S. 3477 does not apply to suits under the Tort Claims Act, but sustained the Government's motion to dismiss on the ground that the Act, strictly construed, gave jurisdiction only where the claim arose directly out of damage, loss, injury or death, and did not cover the claim of an assignee (R. 11-14). An order dismissing the complaint was entered (R. 14-15) and respondent, Aetna Casualty & Surety Company, appealed (R. 15).

The United States Court of Appeals for the Second Circuit reversed, holding, in an opinion by Judge Frank, Judge Learned Hand concurring in part, that the Tort Claims Act is not to be strictly

construed, that it permits the assignment by state law of an injured workmen's cause of action against the United States, that this assignment was involuntary and hence not prohibited by R. S. 3477, as amended (31 U. S. C. 203), but that even if it were otherwise within the terms of that statute, the language and purpose of the Tort Claims Act is "sufficient to carve out an implied exception for this type of claim" (R. 17-20). The court further held that Congress intended to permit such assignments, even though they will cause the United States to lose its counterclaim rights and permit venue in a district where the original claimant could not have brought the action (R. 21). As for the conflict which was pointed out between the provision in the Tort Claims Act limiting attorney fees to 20 per cent of the recovery and the provision in the New York Workmen's Compensation Law allowing the insurance carrier as assignee to retain one-third of the amount recovered over and above the amount of the compensation award, medical expenses, and expenses of the action, which include attorney fees, the court below merely stated that "The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses" (R. 22).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the transfer of Vambell's cause of action to respondent was not subject to the provisions of R. S. 3477.

2. In holding that the assignment of Vambell's cause of action to respondent was an involuntary assignment.

3. In holding that even if the assignment of Vambell's cause of action to respondent were otherwise within the provisions of R. S. 3477, the Tort Claims Act has carved out an implied exception for this type of assigned claim.

4. In holding that the Tort Claims Act permits the Government's right of offset and counterclaim against the original claimant to be defeated through the prosecution of the cause of action by an assignee under state law.

5. In holding that the Tort Claims Act permits venue in a district other than that in which the original claimant could properly have brought the action, by permitting the cause of action to be prosecuted by an assignee of the original claimant.

6. In failing to hold that there is a conflict between the provision of Section 29, Subdivision 2, of the New York Workmen's Compensation Law, allowing the insurance carrier to retain one-third of the excess of any recovery it effects on an injured workman's cause of action, over and above the total amount of compensation awarded, the expenses for medical treatment paid by it, and the reasonable and necessary expenditures incurred in effecting such recovery, which includes attorney fees, and the provision of the Tort Claims Act (28 U. S. C. 2678)

limiting to 20 per cent of the recovery the compensation to be allowed for prosecuting a claim thereunder.

7. In holding that, with regard to the conflict between the provisions of the Tort Claims Act and Section 29 of the New York Workmen's Compensation Law relating to the amount allowable as compensation for prosecuting a claim, the district court, in fixing attorney fees, "may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses."

8. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

This case, together with Nos. 36, 37 and 38 presents the question of the reach of R. S. 3477, the statute invalidating assignments of claims against the United States. It is familiar that R. S. 3477 does not abrogate such assignments but merely requires that the prosecution in and out of court of claims against the Government be in the name of the original claimant. Where claims against the United States under the Tort Claims Act are covered by insurance, insurance companies making payments pursuant to their policies to the insured claimants often acquire rights of indemnification out of any recoveries by the original claimants against the United States. However, R. S. 3477, which prohibits all assignments of claims against

the United States, prohibits such an insurance carrier from bringing suit and recovering judgment in its own name under the Tort Claims Act, regardless of whether the insurance carrier claims as assignee under a statute such as Section 29 of the New York Workmen's Compensation Law or as an equitable assignee by subrogation.

II

A. The application of R. S. 3477 to such assignments of claims under the Tort Claims Act is required not only by the language of R. S. 3477, which is in terms applicable to all transfers or assignments of claims, but by the purposes of that statute. By prohibiting the assignment of claims against the United States, R. S. 3477 enables the Government to discharge its obligations to its original creditors, without becoming involved in disputes between them and third parties as to the existence and extent of assignments and other transfers of the claims. Reading R. S. 3477 with other statutes giving to the United States rights of counterclaim and offset against claimants and judgment creditors, it is clear that these rights may be effectively exercised by the United States against its original creditors only if R. S. 3477 is applied to prohibit any assignee or subrogee claiming under them from bringing suit or recovering judgment upon such claims in his own name. Requiring assignee or subrogee insurance carriers to bring suit in the name of the original claimant will satisfy their rights against the claim-

ant under the insurance contracts in the same manner as assignees have vindicated their interests in claims under the Tucker Act. *United States* v. *American Tobacco Co.*, 166 U. S. 468. At the same time, the purposes of R. S. 3477 will be fulfilled in that the United States will be able to discharge its indebtedness by paying a judgment rendered in the name of the original claimant after adjustment of the Government's cross-claims against him.

B. The purposes of R. S. 3477 make its prohibition of assignments peculiarly applicable to assignments of claims pursuant to the operation of a statute or the equitable doctrine of subrogation. The Government is less likely to be informed of the possible existence of such assignments than of assignments arising out of express agreements which are clearly prohibited by R. S. 3477. This problem of notice of assignments, and the resulting possibility of double payments, were emphasized by Congress in the Assignment of Claims Act of 1940, in which the assignment by express written agreement of certain claims against the United States was permitted upon compliance with elaborate requirements of notice to the United States. However, even where the United States has notice of a claimed assignment by operation of a statute or by subrogation, the more serious problems will relate to whether an interest in the original claim has been effectively transferred to a third person and, if so, to what extent. Further, the recognition of such

an assignment or subrogation to the extent of allowing the assignee to sue in his own name, will result in suits in districts other than that in which the claim arose or the original claimant resided, thereby embarrassing the United States in the defense of such suits, as well as resulting in a multiplicity of suits in the case of partial assignments of tort claims.

C. While this Court has heretofore recognized two classes of exceptions to the universal prohibition by R. S. 3477 of assignments of claims against the United States, it has done so only where it found that the purposes of R. S. 3477 did not require its application. The first class of exceptions is where there has been a transfer of all of the property of the original claimant to a universal successor, such as a trustee in bankruptcy or an executor. In this situation, the Government deals with the successor as it would have dealt with the original claimant—without harassment by conflicting claims, changing venue, multiplicity of suits, and without being deprived of its rights of counterclaim and offset. The second class of exceptions to the literal application of R. S. 3477 which this Court has created consists of situations where the original claim has been allowed, after opportunity for the United States to exercise its rights of counterclaim and offset, and the Government has become merely a stakeholder of the net amount. Voluntary as well as involuntary assignments have been included in

these exceptions, which have been made to turn, not on the nature of the transfer as being by "operation of law", as assumed by the court below, but on the policy and purpose of R. S. 3477 to protect important rights of the United States.

III

Not only does nothing in the Tort Claims Act suggest a Congressional purpose to create an exception to the policy of R. S. 3477, but the express provision reserving to the United States the rights of counterclaim and offset which it has under the Tucker Act commands the application of R. S. 3477 in the traditional manner established under the Tucker Act in order to make those rights effective. Thus, R. S. 3477 is the substantive federal law which determines in whose name suit must be brought under the Tort Claims Act within the meaning of the "real party in interest" provision of Rule 17 of the Rules of Civil Procedure.

IV

If state statutes such as Section 29 of the New York Workmen's Compensation Law are allowed to determine the applicability of R. S. 3477, the present case illustrates the possibilities of conflict between the state law and the policy of the Tort Claims Act. Here the conflict between the limitation of attorneys' fees in the Tort Claims Act and Section 29 can be avoided easily only if R. S. 3477 is applied to require suit in the name of the original claimant, with the incidents of such suit to be gov-

erned by federal law except as to the issue of negligence liability which Congress has referred to state law.

ARGUMENT

I

Introductory Analysis

This case, together with its companion cases, Nos. 36, 37 and 38, this Term, presents the question as to the applicability of R. S. 3477—which prohibits "all transfers and assignments * * * of any claim upon the United States"—to suits brought by insurance carriers as statutory or equitable assignees by subrogation of tort claims against the United States under the Tort Claims Act. In each of these cases, the Government asserts that R. S. 3477 requires judgments against the United States to be rendered only in the name of the original claimant and bars subrogated insurance carriers from proceeding to judgment *in their own names.*

It must be emphasized that the Government does not claim either that the existence of insurance relieves the Government from liability which would otherwise be created by the Tort Claims Act, or that insurance carriers which have paid losses on claims giving rise to liability under the Tort Claims Act are not entitled to appropriate indemnification out of recoveries obtained from the United States upon such claims. The Government invokes the bar of R.S. 3477 against suits by insurance carriers

in their own names solely for two practical reasons: (1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of counterclaim and offset on account of any cross-claims it may have against the original claimants. Stated otherwise, the question in these cases is whether under R. S. 3477 the Government may require an insurance carrier, claiming as the assignee or subrogee of the original claimant's cause of action against the United States under the Tort Claims Act, to sue and recover judgment in the name of the original claimant.[2]

Respondent, Aetna Casualty and Surety Co., supports this suit in its own name against the United States under the Tort Claims Act by the theory that Vambell's claim had been assigned to it by virtue of Section 29 of the New York Workmen's Compensation Law, and on the further

[2] The reversal of the lower court decisions in these cases cannot ultimately defeat the insurance carriers' substantive rights. The Act of April 25, 1949, c. 92 (P.L. 55, 81st Cong.), has amended the limitation provision of 28 U.S.C. 2401(b) so that at any time before April 25, 1950, the original claimants may be joined as additional parties or new actions brought in their names.

theory that by the payment of compensation to Vambell respondent was subrogated to his claim for damages against the United States. The court below, in upholding the right of the insurance company to sue in its own name, held (1) that the assignment of Vambell's claim to respondent was an "involuntary assignment" to which R.S. 3477 does not apply, and (2) that in any event "the language and purpose of the Tort Claims Act [are] more than sufficient to carve out an implied exception for this type of claim." In Nos. 36, 37 and 38, the insurance carrier respondents similarly assert the right to sue and recover judgments in their own names, instead of in the names of the original claimants, on the theory that by the payments which they made to their assureds, the original claimants, they are subrogated to the latters' claims against the United States. In those cases too, the courts below denied the applicability of R.S. 3477, but gave no explanation of their reasons.[3]

Contrary to the views of all the courts below, the Government contends that the language and purposes of R.S. 3477 prohibit such suits by subrogees or other assignees in their own names, that the

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[3] Similar treatment was accorded the Government's contention in *Employers' Fire Insurance Co.* v. *United States*, 167 F. 2d 655, 657 (C.A. 9) and *Old Colony Insurance Co.* v. *United States*, 168 F. 2d 931, 934 (C.A. 6). Only in *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893, 899 (C.A. 4), and *State Farm Mutual Liability Insurance Co.* v. *United States*, 172 F. 2d 737, 739-740, was the matter discussed at all and then only to the extent of the bald declaration that R.S. 3477 "has reference to voluntary transfers or assignments of claims against the United States, not to transfers by operation of law or to equitable subrogation."

Tort Claims Act in no way repealed R.S. 3477, and that the liabilities of the United States under the Tort Claims Act should be discharged, and the fiscal interests of the Government should be protected, by requiring such derivative claimants to bring their suits against the United States under the Tort Claims Act in the names of the original claimants, as has heretofore been the practice in suits under the Tucker Act.

There is no dispute in this Court that in the present case, and in Nos. 36, 37 and 38, the respondent carriers were properly subrogated, in whole or in part, to the original claims of their respective assureds, to each of whom the United States may be liable under the Tort Claims Act for the negligence of government employees. Nor is it controverted that had the suits been brought and, after trial, judgments against the United States rendered in the names of the original claimants, according to the traditional procedure settled in *United States* v. *American Tobacco Co.*, 166 U.S. 468, the respondents would be able to protect their rights by intervening or joining in the suits to obtain a direction in the judgments which would require the original claimants, upon receipt of payment of the judgments entered in their names, to repay to the respondent carriers out of the amounts thereof whatever sums the carriers were subrogated to under the terms of the contracts between the carriers and the original claimants. Civil Rule 24 (a-2); See *United States* v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404 (C.A. 5).

It must be constantly remembered that the purpose of R.S. 3477 is not to destroy and abrogate assignments—whether statutory and equitable assignments by subrogation or express written assignments—but only to limit the obligations of the Government to the original parties with whom it has dealt, so as to relieve it of the uncertainties and embarrassments of dealing with competing claimants. It was early established that by virtue of R.S. 3477 contracts could not be assigned so as to authorize the assignee to sue in his own name. *United States* v. *Gillis*, 95 U. S. 407, affirming 12 Ct. Cls. 704. But it was even earlier settled that a court could fully save the equitable rights of any assignee by viewing the statute as authorizing suit to be brought in the name of the assignor, the recovery to be by the latter to the use of the former. *Jackson* v. *United States*, 1 Ct. Cls. 260.[4]

It was definitely established in the Court of Claims, at the latest, by its decision in *American Tobacco Co.* v. *United States*, 32 Ct. Cls. 207, 223-

[4] It was held sufficient to connect the assignor with the case by his verifying the petition, or filing a warrant of attorney, or by proving the assignment. *Silverhill* v. *United States*, 5 Ct. Cls. 610, 612. And if the assignor died *pendente lite*, verification by his personal representative was sufficient. *Pullen* v. *United States*, 7 Ct. Cls. 507. When assignor and assignee joined, the former verifying the petition alleging the suit is for the assignee, the assignment needed no further proof. *Tebbetts* v. *United States*, 5 Ct. Cls. 607. But a suit in the name of the assignor by an assignee for his own use cannot proceed to judgment without proof of the transfer. *Crowell* v. *United States*, 6 Ct. Cls. 23. Ct. Civil Rule 17(a) providing that "a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action was brought."

226, affirmed, 166 U. S. 468, that R.S. 3477 had the same and no greater effect on the form and substance of suits by insurance carriers asserting equitable assignment by subrogation to claims against the United States. Under R.S. 3477, subrogees were still to be treated in the traditional manner developed by the courts "in connection with the doctrine that upon the grounds of public policy choses in action could not be assigned so as to change the legal obligations and rights from the assignor to the assignee" (32 Ct. Cls. 226). The purpose of R.S. 3477 was to confine the obligations of the Government to parties with whom it had originally dealt and "especially to prevent the complications and troubles which might arise in the adjustment of the rights of parties because of the transfer of the contracts and obligations of the Government." "No complication or trouble as to these rights can arise out of the subrogation of the rights of the parties," the court said, so long as "the obligations and responsibilities of the original parties are to be determined upon the same basis as if no subrogation had intervened" (*Idem.*) That view of the rights and remedies was affirmed by this Court in *United States* v. *American Tobacco Co.*, 166 U. S. 468, and until the present group of cases, appears never to have been challenged.[5]

[5] The identical problem is presented under the Public Vessels and Suits in Admiralty Acts (46 U.S.C. 742 *et seq.*, 782 *et seq.*) in an even more acute form since the broad counterclaim provision of 28 U.S.C. 1346 (e) available under the Tucker and Tort Claims Acts is not available in admiralty. In such cases, the Government's right under 31 U.S.C. 227 to offset against judgments is thus unusually important.

The present cases constitute a renewal of the attacks by subrogated carriers of insurance and surety risks upon the rights of the United States to counterclaim and offset for the amounts of the cross-claims which it may have against the carriers' subrogors. This Court repulsed a broad previous attack in *United States* v. *Munsey Trust Co.*, 332 U. S. 234. There suit was brought by the bank as receiver of the original claimant, a government contractor, but was solely for the benefit of the subrogated carrier on the contractor's performance bond. This Court, reversing the Court of Claims, held that, despite the interposition of the carrier's rights of subrogation and assignment, the United States still retained the right to offset the amount of the Government's tax claim against the original claimant.[8] In the cases now at bar, the attack of the carriers seeks to narrow the *Munsey* rule by establishing their right to sue and recover judgment in their own names, despite the express terms and plain purpose of R.S. 3477. Because suits and judgments in the names of subrogated insurance carriers would permit them largely to defeat the Government's rights of counterclaim and offset

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[8] The offset there was prior to suit and was effected under 31 U.S.C. 71. But the principle that subrogation does not bar the Government from collecting its cross-claims against the carrier's subrogor would seem to apply equally to the Government's rights of counterclaim in pending litigation under 28 U.S.C. 1346 (c) and of offset against judgments under 31 U.S.C. 227 so long as suit is brought and judgment recovered in the name of the original claimant as required by R.S. 3477 and established in *United States* v. *American Tobacco Co.*, 166 U. S. 468. Cf. *United States* v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404 (C.A. 5).

against the original claimants, the decisions below are clearly inconsistent with the rationale of the *Munsey* case.[7]

The decisions below, by holding R. S. 3477 inapplicable and permitting suit under the Tort Claims Act in the name of the carrier, will thus place the statutory or equitable assignee by subrogation in a position superior to that of his subrogor. This result, in our view, is totally unjustified by any legitimate claim by the carriers upon the consideration of Congress and is absolutely opposed to the basic conception that "the party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted. * * * subrogation was never intended to be used as an instrument to circumvent the principles of equity and by circuitous action to permit the assignee to be placed in a more advantageous position than the assignor from whom his rights devolved." *Globe Indemnity Co.* v. *United States*, 84 Ct. Cls. 587, 595, certiorari denied, 302 U. S. 707. See also *Aetna Life Insurance Co.* v. *Middleport*, 124 U. S. 534, 548.

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[7] The reason for the insurance carriers' maneuvers is found in the circumstance that the statutes in terms apply only against the plaintiff named in the suit and judgment. The counterclaim statute (28 U.S.C. 1346 (c) refers to claims or demands of the United States "against any plaintiff commencing an action." The offset statute (31 U.S.C. 227) refers to judgments where "the plaintiff therein shall be indebted to the United States." Its crucial importance for the government is obvious. *Teller* v. *United States*, 113 Fed. 463 (C.A. 8); *Eastern Transportation Co.* v. *United States*, 159 F. 2d 349, 352 (C.A. 2).

II

Statutory and Equitable Assignments by Subrogation Are Not Excepted from the Operation of R.S. 3477 by its Terms or Purposes

In upholding the right of the respondent insurance carrier to bring suit against the United States in its own name, the court below concluded that R. S. 3477 was not applicable to "involuntary assignments." This holding was related by the court to respondent's claim of an assignment pursuant to Section 29 of the New York Workmen's Compensation Law. The court did not specifically discuss the applicability of R. S. 3477 to equitable assignments by subrogation—the alternative theory of the respondent in this case, and the sole basis for claiming an assignment in Nos. 36, 37 and 38, this Term. However, this emphasis upon the allegedly voluntary or involuntary character of the transfer of a claim, and the corresponding failure to look to the function and purposes of R. S. 3477 in protecting the fiscal operations of the Government, could as well lead to the further conclusion that R. S. 3477 does not apply to equitable assignments by subrogation, and, indeed, other courts have so held. We will show that the language and purposes of the statute are peculiarly applicable to assignments of claims against the United States resulting from the operation of law. It will also be pointed out that while this Court has held that certain types of assignments or transfers of claims are not prohibited by R. S. 3477, it has done so in cases involving voluntary and involun-

tary transfers alike, but only in situations where the assignment or transfer resulted in none of the evils which the application of the statute was designed to avoid.

A. STATUTORY AND EQUITABLE ASSIGNMENTS BY SUBROGATION OF CLAIMS AGAINST THE UNITED STATES ARE PROHIBITED BY THE TERMS AND PURPOSES OF R. S. 3477.

Under the literal language of R. S. 3477, 31 U. S. C. 203, there is no exception for "involuntary assignments," as assumed by the court below (R. 20) and the statutory assignment provided by Section 29 of the New York Workmen's Compensation Act is made "absolutely null and void." R. S. 3477 provides as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.* Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having au-

> thority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. [Emphasis supplied.]

Other than the express exception of transfers or assignments made after the allowance of the claim, the ascertainment of the amount due and the issuance of a warrant for payment, R. S. 3477 in terms admits of no exception whatever.

It has uniformly been held indispensable to the valid assertion of an assigned claim against the United States that the prescribed statutory conditions be exactly met. *United States* v. *Gillis,* 95 U. S. 407; *The John Shilloto Co.* v. *McClung,* 51 Fed. 868, 877 (C. A. 6); *H. M. O. Lumber Co.* v. *United States,* 40 F. 2d 544 (W. D. Mich.). But in the present case and its companion cases there can be no contention that the requirements of R. S. 3477 have been met in any single respect. The claims have not been "allowed," there has been no "ascertainment of the amount due" and no warrant for payment has been issued. And it must be recognized at the outset that "no single argument has more weight in statutory interpretation"

than the fact that the statutory language covers the case at hand. *Browder* v. *United States*, 312 U. S. 335, 338.

The statute "embraces alike legal and equitable assignments. * * * It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." *Spofford* v. *Kirk*, 97 U. S. 484, 488.[8] Certainly there is nothing in the language or policy of R. S. 3477 which renders that statute inapplicable to all assignments by operation of law. As the Court observed in *Spofford* v. *Kirk*, 97 U. S. 484, 488-490, "It would seem to be impossible to use language more comprehensive than this." And in *Goodman* v. *Niblack*, 102 U. S. 556, 560, this Court although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * *."

The literal reading of R. S. 3477 as applicable to *all assignments* of claims against the United States, regardless of whether such assignments

[8] We do not understand respondents to deny that "Subrogation is but an equitable assignment, and puts the parties where they would be if an actual assignment had been made." *Faires* v. *Cockerell*, 88 Tex. 428, 435. The original claimant by receiving payment from his carriers "becomes trustee for them, and by necessary implication makes an equitable assignment to them of *his* right to recover *in his name*." *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474; *Rockingham Mutual Fire Insurance Co.* v. *Bosher*, 39 Me. 253, 255; *Aetna Life Ins. Co.* v. *Middleport*, 124 U. S. 534, 548.

are express or result from operation of law, finds compelling justification in the purposes of the statute to protect the fiscal operations of the Government. Indeed, as we point out later (*infra*, pp. 39-45) this Court has carved out exceptions to the literal sweep of R. S. 3477 for, and only for, those types of both "voluntary" and "involuntary" assignments of claims which in no way contravene the purposes of R. S. 3477. Indeed, these exceptions themselves suggest that the applicability or non-applicability of R. S. 3477 should be determined, not in terms of the allegedly "voluntary" or "involuntary" nature of an assignment, but by whether its application is required to effectuate its purposes.

A fundamental purpose of R. S. 3477 is to prevent the Government, in and out of court, from being "harassed by multiplying the number of persons with whom it had to deal" and from "becoming embroiled in conflicting claims, with delay and embarrassment" and the chance of multiple liability. *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Nutt* v. *Knut*, 200 U. S. 12, 20. In other words, the statute was particularly designed to simplify the fiscal management of the United States and insure against "the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction." *Goodman* v. *Niblack*, *supra*, p. 560.

As the Court of Claims stated in *Howes & Co.* v. *United States,* 24 Ct. Cls. 170, 184, "if attachments, subrogations, and assignments, * * * should be upheld, the Government would not only be deprived of the right to settle with those claimants to whom it was originally indebted" but might also be involved in controversies between the subrogees and assignees concerned in such transfers. "The evident purpose [of R. S. 3477] is to protect the ascertainment and allowance of claims, in and out of court, against the splitting of them, against the multiplication of claimants, and against the complexities and uncertainties that might arise from disputes among the original claimant and those claiming under him." *United States* v. *Hill,* 171 F. 2d 404, 406, modified, 174 F. 2d 61 (C. A. 5).

By reason of this protective legislation respecting assignments, the Government has hitherto been able to deal exclusively with original claimants against it. It has been able to obtain a valid discharge by making prompt administrative payment directly to the original claimant of all claims against it, whether arising from contract or tort, without the need of first investigating possible changes in the ownership of the claim. It has not been required to delay payment while attempting to learn whether, in consequence of varying contractual arrangements between its original claimant and his carriers of insurance and surety risks, as to which Congress has not provided for notice to be

recorded with any government officer, there may have been an equitable assignment by subrogation of part or all of his claim, as a result of which the original claimant may no longer be entitled to retain the payment by the United States. Because of R. S. 3477, payment to the original claimant always heretofore gave the Government a valid discharge. Similarly, the Government has heretofore been able to confine its claims litigation to the single question of its liability in tort or contract, without being obliged when sued by the original claimant to also investigate and litigate additional questions arising out of the existence and effect of his insurance and surety contracts and the possible equitable assignments by subrogation resulting thereunder. Because of R. S. 3477, a judgment in a suit by the original claimant was *res judicata* of the Government's liability on the entire cause of action involved.

The effect of the decision below, when applied to the great volume of claims and suits under the Tort Claims Act, will be to defeat the long-recognized purpose of R. S. 3477 to enable the Government to deal directly and entirely with the original claimant without regard to whether, or the extent to which, his claim has been assigned to a third person, either contractually or by operation of law. The difficulties thus created for the Government are, of course, most acute in the case of partial or multiple assignments by subrogation, whether statutory or equitable.

A second basic purpose of R. S. 3477 is to make effective the Government's rights of counterclaim (28 U. S. C. 1346 (c)) and offset (31 U. S. C. 71 and 227) against its creditors. In fact R. S. 3477 must be read with those statutes as an integrated body of legislation designed by Congress to protect the Government from the risk of double payments and to facilitate the settlement of claims by and against the United States. The counterclaim statute, 28 U. S. C. 1346 (c), confers "jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section." The offset statute, 31 U. S. C. 71 and 227, directs the deduction from judgments and allowed claims against the United States of debts as to which "the plaintiff therein shall be indebted to the United States." Both the counterclaim and offset statutes apply in terms only to claims of the United States against the person who appears as plaintiff in the suit or judgment against the United States. Even assuming that the United States may still bring counterclaims arising out of the same transaction or occurrence against a subrogee or other assignee who brings suit against the United States, it is clear that the right of the United States to litigate its counterclaims in such a suit is greatly restricted, for no affirmative judgment could be obtained against such assignee. It is with respect to offsets, however, that permitting assignees to sue in their own names is most disadvantageous to the United

States. The offset statute, 31 U. S. C. 227, is in terms limited to debts owing to the United States by the judgment plaintiff, and therefore does not permit the offsetting against a judgment obtained by an assignee of debts owed to the United States by the assignor or original claimant. See letter from the Comptroller General, Appendix B *infra*, pp. 70-74.

By virtue of the prohibition by R. S. 3477 of the assignment of claims against the United States, the United States when sued has been able under 31 U. S. C. 227 to offset against any judgment in favor of the original claimant the amount of its cross-claims against him, or, if its law officers considered it appropriate, has been able under 28 U. S. C. 1346 (c) to assert such cross-claims as counter-claims in the original claimant's suit against it. The decisions below in this and in the companion cases sweep away this long-established protection of the public treasury with respect to claims under the Tort Claims Act.

Of primary importance are the cases involving the immunity from suit of states and their public bodies, such as highway, bridge and ferry authorities. In waiving its own immunity from suit, the United States has not required reciprocal treatment. While suffering judgments to be entered against itself for damages inflicted on state-owned wharves, bridges, buildings, vessels and vehicles through the negligence of employees of the United

States, the only chance which the United States has to recover for damages inflicted on federally owned property through the negligence of state employees is by counterclaim when sued by the state or by offset against judgments rendered in the state's favor. If the insurance carriers can defeat the right of the United States to offset and counterclaim in such cases by establishing their right to sue and recover judgment in their own names, the Government will incur substantial loss.[9] Moreover, even where the original claimants are private persons, instead of immune public bodies, the aggregate advantage to the carriers and the corresponding loss to the Treasury will be very great. The right to offset and counterclaim for taxes and other miscellaneous indebtedness of original claimants is of no inconsiderable importance to the United States in view of the tremendous number of cases involved.

Other practical purposes served by R. S. 3477, through prohibiting subrogees and other assignees from bringing suit in their own names, are particularly applicable to many claims which will arise under the Tort Claims Act. The insur-

[9] The amounts involved in such cases are very considerable. E.g. in *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893 (C.A. 4), judgment was $196,639.97 for the insurance carrier and $108,526.41 for the state. In *State Road Dept. of Florida* v. *United States*, (N.D. Fla.) August 23, 1949, judgment was for $316,637.58, with direction, in accordance with *United States* v. *Hill*, *supra*, for the state to pay over $215,000.00 less attorneys' fees, to the carrier. While in neither case did the United States have any large cross-claim, in many instances it does.

ance carriers gain important advantages if they may sue in their own names and therefore lay venue anywhere throughout the United States where they are doing business (28 U. S. C. 1402 (b), 1391 (c); cf. 46 U. S. C. 782). They can thus try their lawsuit at some place to which the Government cannot readily bring its witnesses because, except as to those still in government employment, it is unable to compensate them, and compulsory process is restricted by force of Civil Rule 45 (e-1) to persons in the district or within one hundred miles. The Government is thus confined to depositions, while the insurance carriers have the advantage of live witnesses. Moreover, by splitting the cause of action into parts (cf. Nos. 37 and 38) the Government may be obliged to relitigate the same cause of action several times in different districts.[10]

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[10] This consequence is well illustrated by two suits brought by the Glen Falls Indemnity Company against the United States, being Civil Nos. 3020 and 3021 in the United States District Court for the Northern District of New York. Civil No. 3021 grew out of a collision near Florence, South Carolina, between an Army A-26 aircraft and a DC-3 operated by Eastern Air Lines, Inc. The Glen Falls Indemnity Company, which carried Eastern's insurance, paid Eastern $90,500 for the loss of its airplane and took a "subrogating receipt" assigning to it Eastern's rights arising out of the collision. Eastern Air Lines, Inc., brought an action for $125,000 damages in the District of Delaware, the district of its residence, and thereafter Glen Falls Indemnity Company brought a separate action, Civil No. 3021 in the Northern District of New York, claiming damages in the same amount. The United States has a counterclaim against Eastern for $193,557.56 based on the same accident, which it is asserting in the Delaware suit. The history of Civil No. 3020 is identical, except that the accident occurred at Nashville, Tennessee, and the Government is not

These, then, are the purposes of R. S. 3477 and the practical problems arising out of the assignment of claims against the United States. They are problems which Congress, in R. S. 3477, fully met by providing that "All transfers and assignments made of any claim upon the United States," except upon conditions which admittedly are not satisfied in this case, "shall be absolutely null and void." Since the difficulties created by the assignment of claims against the United States are no less because such assignments result from the operation of law rather than from an agreement to assign, the purposes of R. S. 3477 confirm its literal language as prohibiting every type of assignment of claims against the United States except those complying with the statutory conditions.

B. THE PURPOSES OF R. S. 3477 ARE PARTICULARLY APPLICABLE TO ASSIGNMENTS OF CLAIMS RESULTING FROM THE OPERATION OF A STATUTE OR FROM THE EQUITABLE DOCTRINE OF SUBROGATION.

We have pointed out that the terms and purposes of R. S. 3477 are fully applicable to all assignments which enable an assignee to bring suit in his own name against the United States, regardless of whether such assignment results from express contract or by operation of law. In fact, the problems created for the United States by

asserting a counterclaim. Thus each cause of action is the subject of two suits, one brought by the original claimant in the district of its residence, and the other brought by a partial subrogee claiming also as assignee in the district of its residence.

assignments resulting from the operation of law particularly require the application of R. S. 3477. If the decisions below are affirmed, the United States must henceforth, before paying an original claimant, make certain that one insurance or surety carrier has not notified some of the Government's many officers and employees that the carrier claims by subrogation or assignment, so that payment must not be made to the original claimant. For this purpose a tremendous reporting and record-keeping procedure will need to be organized at great public expense.

Analytically, in the absence of R. S. 3477, an assignment of a claim against the United States could be created by a written assignment by the original claimant to an assignee. In such a case, the United States would discharge its debt if, without notice of the assignment, it paid its original claimant. Conversely, if the assignee properly notified the Government of his assignment and claimed under it, the Government would be—at least theoretically—informed of the existence of an assignment. And were it not for the vast size of the Government, with its hundreds of thousands of employees to whom such a notice might have been given, the United States could then govern itself appropriately. Yet, it is entirely clear that Congress, having recognized the virtual impossibility of providing a workable plan for giving and recording such notices, adopted the contrary course and prohibited assignments.

The Act of February 26, 1853, now R. S. 3477, prohibits "all transfers and assignments * * * of any claim upon the United States" excepting only those executed in writing before witnesses and after allowance and issuance of a warrant for payment. As recently as 1940, Congress in enacting the Assignment of Claims Act, 54 Stat. 1029, as amended, 31 U. S. C. 203, which relaxes the prohibition of R. S. 3477 in certain cases, recognized that where assignments of unliquidated claims against the Uniter States are to be permitted, it is indispensable for the Government to be accurately informed of their existence and extent. Thus that statute required that notice of the assignments be given not only to the department concerned but also to the General Accounting Office and to the disbursing officer who would be charged with paying any claim involved. See also H. Rep. No. 2925, 76th Cong., 3d Sess. and S. Rep. No. 2136, 77th Cong., 3d Sess. It seems obvious that no comparable plan for notice and recording of rights of subrogation could be conceived to solve the conflicts and uncertainties resulting from the competing claims so often present where subrogation is involved.

The problem is far from a mere theoretical danger. It arises particularly in the handling of localized administrative settlement of claims under $1,000. A conspicuous example is that of *Old Colony Insurance Co.* v. *United States,* 168 F. 2d 931 (C.A. 6), one of the cases relied on by the courts below, where the right of the equitable assignee by

subrogation to sue in its own name despite R. S. 3477 was sustained. There, at the same time that the insurance company, which under a $50 deductible collision insurance policy had paid the greater part of the original claimant's loss, was proceeding against the Government by suit in its own name under 28 U. S. C. 1346 (b) and 2674 to recover the amount of its payment, the original claimant was obtaining an administrative adjustment of his claim by the Department of the Army under 28 U. S. C. 2672. The government attorneys were never advised of the pendency of the administrative claim as its relation to the suit was not noticed, apparently because the claim was being handled by a different office of the Army Department than the litigation and there was no system of central office cross-indexing of claims and litigation by subject-matter, as distinct from claimants, so as to discover possible duplications. The first information regarding the administrative claim received by government counsel was when insurance counsel advised immediately before the argument in the Court of Appeals that a check for the entire amount of the loss had been issued to the original claimant. Government counsel proceeded with the argument under the impression that the check would be returned. However, the check was not returned and the fact that it was outstanding rendered the case moot so that certiorari could not be asked and the case was dismissed when remanded to the trial court.

Admittedly there was inadvertent error on the part of the Army Department in not discovering that a claim which was the subject of an administrative claim by one claimant was also the subject of a suit brought in the name of an entirely different claimant. But the maintenance of a filing and indexing system which would disclose all possible duplications of claims would prevent regional settlement of claims and unreasonably and unnecessarily increase the delays to claimants and the burden on the Government in the administration of the Act. We submit that the courts should not authorize a judicial procedure which exposes the United States to such increased peril of double payment.

But, even assuming that in most cases the Government could in some way discover the possible existence of an assignment by statute or of an equitable assignment by subrogation, and refuse to pay until the rights of the claimants should be clarified, the more difficult questions would relate to whether such an assignment actually existed and, if so, its extent. At this point, the Government would be truly involved in the "complexities and uncertainties that might arise from disputes among the original claimant and those claiming under him." *United States* v. *Hill,* 171 F. 2d 404, 406, modified, 174 F. 2d 61 (C. A. 5). The Government can avoid being involved in such questions only if R. S. 3477 is applied in the light of its purposes—so as to preclude insurance carriers, claiming as statutory or equitable assignees of un-

liquidated tort claims against the United States, from suing and recovering in their own names.

Even in cases such as the instant case, where the statute purports to work an assignment of the original claimant's entire cause of action, there are possibilities of dispute with which the United States ought not to be concerned and from which R. S. 3477, if applied as intended by Congress, will spare the Government from becoming involved. Thus, the insurance carrier is not assigned the right to prosecute the complete claim in every case. Cf. *Liberty Mutual Ins. Co.* v. *American Incinerator Co.*, 51 F. 2d 739 (S.D. N.Y.); *United States F. & G. Co.* v. *Graham & Norton Co.*, 254 N. Y. 50. Nor does transfer occur immediately upon receipt of compensation by the injured workman, but only after he fails to sue within the period prescribed by Section 29. *Taylor* v. *N. Y. Central R. R. Co.*, 294 N. Y. 397, 402. Again, mere institution of suit by the original claimant is not enough to bar action by the statutory assignee; satisfaction of judgment is necessary. *Commissioners of the State Insurance Fund* v. *Farrand Optical Co.*, 295 N. Y. 493. Hence there can be frequent disputes and resulting multiple suits. This problem has already confronted the Government in *Commissioners of the State Insurance Fund* v. *United States*, 72 F. Supp. 549, further proceedings 76 F. Supp. 850, 853 (S.D. N.Y.), where the insurance carrier sued the United States, but the injured workmen insisted upon their right to sue separately

in their own names and the court required them to be dropped from the carrier's suit. Moreover, in circumstances where a workman permanently employed in one state, as in New York, is temporarily transferred by his employer to another, Section 29 may be unable to operate upon the workman's entire claim, since he may have rights to compensation both under the law of the state where the injury occurred and in New York, the state of his permanent employment. See *Industrial Commission* v. *McCartin,* 330 U. S. 622. All such controversies are easily avoided if R.S. 3477 is applied, the rule of *United States* v. *American Tobacco Co.*, 166 U. S. 468, followed, and suit required to be brought and judgment recovered in the name of the original claimant.

But while this case presents the problem in its simplest form—where the insurance carrier apparently is the assignee or subrogee of the entire claim against the United States,—in the companion cases of *United States* v. *Yorkshire Insurance Co.* and *United States* v. *The Home Insurance Co.,* Nos. 37 and 38, this Term, each of two insurance companies is suing the United States as *partial* assignee of the same unliquidated tort claim against the United States, while the original claimant apparently still retains a third portion. The possibilities thus presented for the splitting of causes of action and the multiplication of suits against the United States,—both of which the courts have recognized that R.S. 3477 was intended to prevent,—

are obvious. The Government would be required to determine, under peril of liability to make double payment, the validity and extent of the claimed right of subrogation. To obtain a valid discharge the United States must pay the proper party. Before paying, it would be required to determine whether the insurance or surety carrier or the original claimant was the lawful owner of the claim. Henceforth no mere claims examiner, although able enough to pass on the Government's liability, could be entrusted with the decision as to the person entitled to payment.[11] Only experienced lawyers skilled in insurance and surety practice and compensated at corresponding salaries could be relied upon to determine whether the particular contract between the original claimant and his insurance or surety carrier was one resulting in subrogation, so that the United States could obtain a valid discharge only by payment to the carrier, or not resulting in subrogation, so that only payment to the original claimant would discharge the Government.

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[11] The question of whether in fact the insurance company is subrogated is a prolific source of complicated litigation. See e.g. *Crab-Orchard Improvement Co.* v. *C & O Ry. Co.*, 115 F. 2d 277 (C.A. 4); *Mercer Casualty* v. *Perlmen*, 62 Ohio App. 133, 23 N.E. 2d 502; *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assurance Co.*, 283 U. S. 284. As observed in *Suttles* v. *Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y.S. 1024, "The theory and basis of the right of the insurer to subrogation is that the insured has a claim against a third person which he could enforce for the loss insured against * * * but it does not follow in all cases where there has been a loss that the insurer is entitled to be subrogated to every means available to the insured for recouping his loss."

We conclude, therefore, that in the light of the purposes of R. S. 3477 in protecting the Government's fiscal operations, its prohibition of all types of assignments of claims is peculiarly applicable to the assignment of unliquidated claims under the Tort Claims Act by virtue of state statutory provisions or of the equitable doctrine of subrogation.

C. STATUTORY AND EQUITABLE ASSIGNMENTS BY SUBROGATION ARE NOT WITHIN THE EXCEPTIONS TO R. S. 3477 WHICH THIS COURT HAS HERETOFORE RECOGNIZED.

While the court below held that R. S. 3477 "does not apply to involuntary assignments", the decisions of this Court show that exception of an assignment from the prohibition of R. S. 3477 derives from the function and policy of the statute in the fiscal management of the Government, rather than from any easy characterization of the assignment as "voluntary" or "involuntary".

It is true that in a number of cases, this Court has said that certain transfers by operation of law are beyond the scope of R. S. 3477. *Erwin* v. *United States,* 97 U. S. 392, 397; *Price* v. *Forrest,* 173 U. S. 410; *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655; *Western Pac. R. R. Co.* v. *United States,* 268 U. S. 271. But the Court has made a similar determination with respect to certain types of voluntary assignments. *Goodman* v. *Niblack,* 102 U. S. 556. Reading both lines of authority in

conjunction, it is clear that all the decisions were based upon the function and policy of the Act and not the form of the transfer, and that any transfer which conflicts with both the letter and policy of the statute falls within its prohibition whether the transfer be involuntary and solely by operation of law or not.[12]

The type of situation to which R. S. 3477 is inapplicable is that presented where all of the claimant's property has been transferred by operation of law to the claimant's successor or representative, whether by descent (cf. *Erwin* v. *United States supra*), consolidation in corporate reorganization (*Seaboard Air Line Ry.* v. *United States, supra*), purchase at a judicial sale in such a reorganization (*Western Pacific R. R. Co.* v. *United States, supra*), or through some other change in the claimant's legal status. Similarly, R.S. 3477 is inapplicable to a purely voluntary assignment of all of the claimant's assets for the benefit of creditors. *Goodman*

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[12] The remark of the court below that the assignment herein was involuntary in that the claim passed to respondent under the New York statute "regardless of Vambell's intent or even of his knowledge" (R. 20), has no bearing on the question of its validity. As shown herein, the exception of an assignment from R. S. 3477 does not depend on the voluntary or involuntary nature of the transfer. But the contract of insurance was voluntarily entered into and the original claimant voluntarily chose to receive payment and thereby to permit his claim against the United States to be transferred to the respondent either under the statute or by subrogation—a choice which must certainly be characterized as voluntary. Such transfers are thus voluntary, although finally completed and made absolute by the rule that receipt of payment from the carriers "makes an equitable assignment to them of his right to recover." See *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474. The situation thus differs in no way from an express

v. *Niblack*, 102 U. S. 556. In such cases, there is a complete substitution of an authorized representative in the place of the original claimant. In this type of situation, it is necessary to withdraw the transfer from the operation of R. S. 3477 in order to effectuate the policy of the statutes which provide for the appointment of receivers and trustees in bankruptcy, and executors and administrators of decedents' estates, and to prevent unjust enrichment to the United States by way of windfall.

In such cases, it is not only obvious that there must be representative action, but it is likewise clear that such representative control does not embarrass the Government, which simply deals with the substituted representative as it would have dealt with the claimant if there had been no substitution. On the contrary, recognition of the transfer is for the convenience of the Government.[13] Prior to the death or bankruptcy, the United States could sue the claimant, it could counterclaim against him if the claimant sued first, and recover

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assignment which cannot operate except to the extent permitted by law. For as this Court observed in denying the right to sue in its own name to a purchaser at a judicial sale pursuant to a voluntary mortgage, "if the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition." *St. Paul R.R. Co.* v. *United States*, 112 U. S. 733, 736 further explained in *Butler* v. *Gorley*, 146 U. S. 303, 313.

[13] In essence this line of cases is but a corollary of the cases recognizing that since the function of the statute was the protection of the United States, not the claimant, its benefits may be waived by the Government at will. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594-596; *McGowan* v. *Parrish*, 237 U. S. 285, 294; *McKnight* v. *United States*, 98 U. S. 179, 185; *Freedmans Savings Co.* v. *Shepherd*, 127 U. S. 505, 506; *Bailey* v. *United States*, 109 U. S. 432, 435.

an affirmative judgment, and it could offset its cross-claim if he obtained a judgment against the United States. If transfers of this type are recognized, the Government is in precisely the same position with reference to the executor, administrator, or trustee in bankruptcy. Moreover, such universal assignments by operation of law can give rise to no controversies as to the existence and extent of the transfer for adjudication between the United States and the original claimant and his trustee, receiver or administrator. Those matters have already been finally determined by a competent court and payment will give the United States the valid discharge which it seeks and will permit the Government's exercise of its right to offset its claims for which the receiver or trustee, as universal successor, must respond.

The only cases in which transfers of claims against the United States have been sustained by this Court in the absence of a general transfer of all the claimant's assets are those where the claim had already been adjusted and allowed and where, therefore, the Government was merely in the position of a stakeholder.[14] For example, in *Price* v.

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[14] It is true that R. S. 3477 has been held inapplicable to the purchase at a judicial sale of all the assets of a corporation in reorganization (*Western Pac. R. R. Co.* v. *United States*, *supra*) and that the purchaser at such a sale does not necessarily succeed to all the liabilities of the original claimant. In the *Western Pacific* case, however, no question of embarrassment to the Government in the settlement of any counterclaim was involved. In view of the nature of reorganization proceedings, no such question could arise even if the Government had a claim against the original corporation. In such proceed-

Forrest, 173 U. S. 410, relied upon by the court below, a debtor was directed by court order to deliver and endorse to a receiver any draft obtained from the Government in payment of the debtor's claim and to consent in writing that any balance which might be allowed should be paid to the receiver. After the claimant's death, his heirs were enjoined from demanding or receiving payment from the Government. The question whether the Government officials could be enjoined from paying any award to the original claimant or his heirs was not decided. The Court said (pp. 423, 424):

> We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; *provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the*

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ings; all claims against the original corporation would be presented to the receiver and allowed or disallowed prior to the sale in order to determine the claimant's status under the reorganization plan. The respective claims of the Government and the original corporation would be adjusted and the Government's position as net creditor or debtor would be determined prior to sale. As a practical matter, therefore, the Government would never be required to deal with more than one person in a reorganization case.

> *United States.* * * * Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of court appointing the receiver would be null and void, as between those who are parties to the cause and who are before the court. [Emphasis supplied]

Similarly, in *Houston* v. *Ormes,* 252 U. S. 469, the Court held that R. S. 3477 was not a bar to an action seeking to establish a lien for attorneys' fees on a fund appropriated by Congress to a specific claimant and to require the Secretary of the Treasury to pay the fund to a receiver. The decision was placed upon the ground that the statute "does not stand in the way of giving effect to an assignment by operation of law *after the claim has been allowed.*" (*Id.* at 474, emphasis supplied.)

It is evident that the present case falls neither into the category of cases where the legal status of the original claimant is changed, so that unless the representative or successor is allowed to prosecute the claim the United States will be unjustly enriched by escaping liability for the tort of its employee, nor does it fall into the category of the transfer of a claim which has been allowed after all lawful counterclaims and offsets in favor of the United States have been effected. On the contrary, this was the assignment of a single claim only, placing it in the hands of respondent who, under the

decision of the court below, is free to prosecute it without being answerable on any counterclaim or offset which the United States would normally assert against the assignor before final allowance of his claim or payment of any judgment rendered in his favor.

The foregoing analysis demonstrates, we believe, that the holding of the courts below that R. S. 3477 is not a bar to the maintenance of the present actions by respondents in their own names, finds no support in the decisions of this Court. And since, as we have shown, the type of transfer of claim involved in statutory and equitable assignments by subrogation violates both the letter and the purpose of the statutory bar, we believe it evident that the courts below erred in failing to apply R. S. 3477 and require suit to be brought and judgment recovered exclusively in the original claimant's name.

III

The Tort Claims Act Has Not Repealed R. S. 3477 Nor Excepted Statutory or Equitable Assignments by Subrogation from its Operation

The court below, as its second ground for holding that statutory or equitable assignments by subrogation are not barred by R. S. 3477, stated, "we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim" (R. 33). No elaboration of this view was advanced. Its rationale would appear equally applicable to express written assignments so that an original claimant could always defeat the rights of the United States in respect of

venue, counterclaim and offset by assigning his claim to a third party. We submit that any such exception to the command of R. S. 3477, so easily found below, must be based on compelling considerations and that no such factors are here present.

A. THE LANGUAGE AND PURPOSE OF THE TORT CLAIMS ACT ARE FULLY SERVED IF THE PERSON ORIGINALLY DAMAGED CAN MAINTAIN AN ACTION.

The district court correctly, in our view, dismissed respondent's complaint. The complaint alleged that respondent itself "has been damaged and is entitled to recover" (R. 4). It did not purport to be a suit in the right of Vambell who had been injured by the United States. Respondent's damage, if any, by being required to pay Vambell was the consequence of its contract with his employer, not of the tort of the United States. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301. The Tort Claims Act confers jurisdiction on the district courts "of all civil actions on claims against the United States for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government" (28 U. S. C. 1346). It is beyond controversy that the only claim against the United States "for injury or loss of property, or personal injury or death" within the language of the Act is that of the individual whose person or property is injured or damaged. Payment to such an individual by an insurance carrier

does not give rise to any new claim by the carrier against the United States, jurisdiction of which has been granted by the Tort Claims Act.[15] All that can occur is that in those cases where a statute provides that the original claim shall be assigned to an insurance carrier or where the carrier's contract is of a type by which upon payment it becomes subrogated to the original claim of its assured, the carrier becomes statutory or equitable assignee of the claim of the original claimant against the United States. It follows that if such statutory or equitable assignments are barred by R. S. 3477, as the United States contends, the carrier has no claim upon which it can sue the United States under the Tort Claims Act in its own name, although as a subrogees it is unquestionably entitled to have suit brought and, if liability is found, to have judgment rendered in the name of the original claimant.

The Government contends, therefore, that any suit against the United States by the carriers on the ground that they have made payments to their assureds pursuant to their insurance contracts, does not fall within those cases of which jurisdiction is granted by the Tort Claims Act. We believe that the mere statement of this contention is ample to establish its correctness if, as the United States

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[15] *Cascade County* v. *United States*, 75 F. Supp. 850, 852; Cf. *United States* v. *Gillis*, 95 U. S. 407, 417; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474. The fact that twelve sources of claims are listed as excluded indicates no intent that other types of claim may be sued on by others than the original claimant. But cf. *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656 (C.A. 9).

believes, R. S. 3477 applies to suits under the Tort Claims Act just as it has always been applied to suits under the Tucker Act. Accordingly, we turn to the consideration of that basic question.

The purposes of the Tort Claims Act are fully served if the person originally sustaining injury can maintain his tort action against the United States and if any subrogee can sue and recover in his name in the traditional manner. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474; *Doleman* v. *Levine*, 295 U. S. 221, 225; *United States* v. *Hill*, 174 F. 2d 61 (C. A. 5). It is not necessary also to permit the cause of action to be transferred to another with an absolute right to recover judgment against the United States in his own name and thereby cut off the offsets and counterclaims which the Government may have against the original claimant. This fact alone is sufficient, we submit, to sustain the Government's position herein in view of the familiar rule that implied repeals are looked upon with disfavor. *General Motors Corp.* v. *United States*, 286 U. S. 49, 61-62; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Borden Corp.*, 308 U. S. 188, 198; *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 209.

Moreover, it seems hardly likely that Congress intended that the persons who might sue the United States on the claim of another should depend on the particular variations of local state law. The Tort Claims Act does not in terms suggest it and we submit that the policy of the Act demonstrates it should

not be so construed. Cf. *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Schillinger* v. *United States*, 155 U. S. 163. It must be remembered that whatever the extent of the Tort Claims Act's consent to suit, it does not, unlike corporate sue-and-be-sued clauses, extend consent to every suit nor to suit in every form. The limits of consent to suit are jurisdictional and it is settled that state law cannot enlarge or restrict the jurisdiction of the federal courts. *Munro* v. *United States*, 303 U. S. 36, 41; *Penn Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 175.

B. THE TORT CLAIMS ACT DID NOT REPEAL R. S. 3477 EITHER IN TERMS OR BY ANY NECESSARY IMPLICATION.

The view of the court below that the Tort Claims Act carves out an exception to the statute finds no support in the treatment given by this Court to similar acts permitting suit against the United States. These same contentions that R. S. 3477 was impliedly repealed were made many years ago in respect of the legislation authorizing suit against the United States in the Court of Claims. This Court rejected them in *United States* v. *Gillis*, 95 U. S. 407, 414-416, observing:

> * * * If it be said the danger the act sought to provide a guard against was that fraudulent assignments of just claims might be im-

> posed upon the accounting officers, so that the government, after one payment to a pretended assignee, might find itself confronted by the real creditor and be called upon to pay again, the answer is that the same danger would attend the payment or allowance to an assignee, after a trial in court, * * * We discover nothing in reason, nothing in the mischief the act was plainly intended to remedy, and nothing in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made; nothing that can justify our holding that, when Congress said all transfers or assignments, partial or entire, absolute or conditional, of claims against the United States shall be null and void, they meant they should be in operation [inoperative] only when presented to the accounting officers of the treasury, but effective when presented everywhere else.
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> That the act creating the Court of Claims did not work a repeal of any provisions of the act of 1853, nor itself make claims assignable that were incapable of assignment before its enactment, is beyond reasonable doubt. It certainly contains no words expressly repealing any former statute, either in whole or in part. And there is no necessary implication of intentional repeal. Implied repeals are not favored. * * *

And this Court concluded that "claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name" (*ib.* 417). This view of the matter was followed in *United*

States v. *American Tobacco Co.*, 166 U. S. 468, 474, which again held that insurance carriers should sue in the name of the original claimants.

But, unlike the legislation culminating in the Tucker Act, the Tort Claims Act is not silent on the point. It expressly provides that both court and payment procedure, including counterclaim and offset, should follow the federal law as previously applied by the courts under the Tucker Act. In Section 411 of the original Act (60 Stat. 844) it is expressly declared that all matters of court procedure under the Tort Claims Act shall, like those under the Tucker Act, follow the Federal Rules of Civil Procedure and that "the same provisions for counterclaim and set-off * * * and for payment of judgments, shall be applicable as in cases brought in the United States district courts" under the Tucker Act.[16] And the House Judiciary Committee expressly stated that the intent of the Act was that the district courts should exercise the same type of jurisdiction as under the Tucker Act.[17]

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[16] The Act provides: "PROCEDURE; Sec. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505)."

[17] H. Rep. No. 2245, 77th Cong. 2d Sess. p. 9:

"It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act.

We believe, therefore, that Congress clearly intended this provision as a reaffirmance and implementation of the traditional policy of assuring certainty in the Government's rights of counterclaim under 28 U. S. C. 1346 and offset under 31 U. S. C. 227 which underlies the established rule that R. S. 3477 requires that claims against the Government be prosecuted in the name of the original claimant.[18] Moreover, if Congress had expected that R. S. 3477 would not apply to prohibit suits by assignees and transferees in their own names, it would have provided in the section regarding venue, for the transfer of actions brought by a subrogee or other assignee in the district of his residence to the district where the accident occurred or the original claimant resided.[19]

But this provision as to procedure does not stand

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* * * The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. See *United States* v. *Sherwood*, 312 U. S. 584 (1941); *Lynn* v. *United States*, 110 F. 2d 586, 588 (C. A. 5, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891)". See also H. Rep. 1289 79th Cong., 1st Sess.

[18] S. Rep. 1196, 77th Cong., 2d Sess., p. 6: Judgments "are to be paid in the same manner as judgments rendered upon contract claims under the Tucker Act" and the same practice and procedure is to govern.

[19] It should be noted that as enacted the Tort Claims Act (Sec. 410, 28 U.S.C. 1402(b)) permits venue in either the district where the accident occurred or in that of the plaintiff's residence. The Senate at one time restricted venue to the place of the accident alone. See H. Rep. 2245, 77th Cong. 2d Sess. p. 11. At no time was the serious venue problem, and the danger of harassment of the United States as a result of assignments and subrogations, ever adverted to in the reports or debates.

alone. Under 28 U. S. C. 1346 (b) and 2674, the local law is made controlling only on the question of whether an actionable tort has been committed and not on the transfer of the original claimant's right of recovery after it has occurred.[20] While the question of whether an actionable wrong has occurred was referred by Congress, as a matter of convenience, to the rules of local law, the question of how such a right of action may be transferred and in whose names the action must be filed is left to be determined by the law of the federal forum. *State of Maryland, to use of Burkhardt* v. *United States*, 165 F. 2d 869, 871 (C. A. 4); cf. *Montgomery Ward & Co.* v. *Callahan*, 127 F. 2d 32, 36 (C. A. 10). Thus the question of the rights of the subrogee or other assignee of a claim against the United States to sue and recover in his own name instead of that of his transferor is governed exclusively by federal law. That law, we submit, is found in R. S. 3477 on the basis of which the Government's fiscal management procedures have long been established. (See letter of the Comptroller General, Appendix B, *infra*, pp. 70-74.

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[20] Section 1346 provides: "Subject to the provisions of chapter 171 of this title [*i.e.*, § 2674], the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * *caused* by the negligent or wrongful act or omission of any employee of the government * * * *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" And Section 2674 provides: "The United States *shall be liable* * * * *in the same manner and to the same extent as a private individual* under like circumstances" [Emphasis supplied]

The Tort Claims Act, like the Tucker Act, is administered by the courts under the Federal Rules of Civil Procedure in the same manner as litigation between private parties. However, those rules expressly save the operation of substantive rules such as R. S. 3477. Civil Rule 17 (a) expressly provides that a trustee or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. The settled interpretation of the anti-assignment statute clearly authorizes and requires the bringing of such suits in the name of the original claimant. And in *United States* v. *American Tobacco Co.*, 166 U. S. 468, where suit was brought in the name of the original claimant instead of the forty-two subrogated insurance carriers, this Court declared (p. 474):

> The companies must recover in the name of the tobacco company and by reason of its rights. * * * Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of *his* right to recover *in his name.*

See also, *Aetna Insurance Co.* v. *Hannibal & St. J. R. R. Co.*, 1 Fed. Cas. No. 96; *Southern Bell Telephone Co.* v. *Watts*, 66 Fed. 460 (C. A. 4).

The alternate provision in Rule 17 (a) providing for suit in the name of the "real party in interest" while abolishing the practice of "use suits" in ordinary cases between private parties does not conflict with R. S. 3477. As pointed out in 3 Moore, *Federal Practice* (2d ed., 1948), § 17.02, p. 1305, the meaning and object of Rule 17 (a) would be more accurately expressed if it read: "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced." We believe that correctly construed the substantive effect of R. S. 3477 is to make only the original claimant the correct party plaintiff in suits against the United States. As was pointed out by the court in *United States* v. *Hill*, 171 F. 2d 404, 407, the anti-assignment statute has a serious public purpose and is not a mere technicality set aside by the Civil Rules. "It is a peculiar and substantial incident attached specially to all claims against the Government whether adjusted in or out of court." The general provisions of the Civil Rules as to real party in interest for purposes of suit "have neither the intention nor the effect of setting aside this Act."

We submit that the foregoing analysis of the purpose and language of the Tort Claims Act demonstrates the continued validity of R. S. 3477 in these fields. The insurance carriers' assertion of a right to prosecute to judgment in their own names all or part of the insured original claimants' causes of action against the United States is without prac-

tical justification. No reason appears why their legitimate substantive interests in reimbursement out of a possible recovery from the United States cannot be protected in connection with actions under the Tort Claims Act as that interest has been traditionally protected under the Tucker Act. See *United States* v. *Hill, supra;* cf. *United States* v. *American Tobacco Co.,* 166 U. S. 468. If added protection is required by the carriers against the original claimants with whom they have contracted, it is readily available by the familiar devices of policy cooperation clauses and payment on "borrow and loan" receipts. After all, it cannot be disregarded that the insurance carrier chooses its assureds and should assume the risk of their good faith. There is no reason to impose upon the United States the duty of protecting the carrier from the bad faith of its assured in failing to perform his duty to reimburse the carrier out of the payment received from the United States.

IV

Section 29 of the New York Workmen's Compensation Law is Incompatible with the Tort Claims Act

The foregoing demonstrates, we believe, that Congress in enacting the Tort Claims Act plainly contemplated that R.S. 3477 would apply to statutory and equitable assignments by subrogation. Further conclusive evidence that the application to the United States of provisions such as Section 29 of the New York law was not intended by Congress, is found in the fact that many of the incidents of

such local statutes not only would embarrass the Government in its purpose of effecting quick and equitable settlement with the injured man, but are totally inconsistent with the policy and provisions of the Tort Claims Act. Under the Tort Claims Act, attorney fees are limited to 20 per cent of the amount recovered by suit. 28 U.S.C. 2678. Criminal penalties are provided for those who charge, demand, receive, or collect an amount in excess of 20 per cent "for services rendered in connection with such claim * * *." Section 29 of the New York Workmen's Compensation law provides a different measure of compensation for services rendered in the prosecution of the claim by the statutory assignee. Under paragraph 2 of Section 29, the assignee may retain one-third of the amount recovered in excess of the total amount of the compensation awarded, the medical expenses paid by it, and the expenses incurred in effecting the recovery. See Appendix A *infra*, pp. 69-70. Such expenses, of course, include attorney fees. See *Lappin v. National Container Corp.*, 179 Misc. 109, 112, 37 N.Y.S. 2d 800.

To hold, as did the court below, that an action against the United States under the Tort Claims Act is in all respects like an action under state law against a private person is thus to make the provisions of the Tort Claims Act internally inconsistent and totally defeat the policy of the Act respecting the net recovery to be received by the original injured claimant. If the local state law is controlling, the limitation in the federal act on the compensa-

tion allowable for the prosecution of an action is entirely removed. Obviously Congress never intended to authorize such a result.[21] Yet the Court of Appeals made no effort to reconcile this inconsistency, its only reference to it being the statement at the close of the majority opinion that "The district court, of course, may consider the fact that the state statute allows plaintiff a portion of the recovery to cover its expenses" (R. 22). As a statement of the New York law this remark of the court below is plainly incomplete, for section 29 not only allows the statutory assignee the reasonable and necessary expenses incurred in effecting the recovery (in addition to the amount of the compensation award and medical expenses), but it also allows one-third of the excess of the recovery over and above these amounts. But the remark can equally be construed as a suggestion by the Court of Appeals that the district court could by allowing no attorney fee whatever, keep the assignee's compensation for prosecution of the action within the limits set by Congress.[22] Even if this procedure would work in every case, which obviously it would not, it is inconceivable, in view of the criminal penalties,

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[21] Heretofore great deference has been shown such directions of Congress respecting attorneys' fees. See e.g., *Ball* v. *Halsell*, 161 U. S. 72, 84.

[22] This would be true where one-third of the net recovery, after deducting the amount of the compensation award, medical expenses, and the expenses of suit other than attorney fees, was no more than 20 per cent of the total recovery before deductions. Where one-third of the net recovery would be greater than 20 per cent of the whole, even the procedure suggested by the court below would not be sufficient to reconcile the provisions of the state and federal law.

that Congress intended to make the enforcement of its policy of limiting attorneys' fees discretionary with the district courts.

This conflict of policy between the New York compensation statute and the attorney fees provision of the federal act is but one of the possible sources of controversy if state compensation laws are allowed to transfer claims against the United States notwithstanding R.S. 3477. All states except Mississippi have workmen's compensation statutes. United States Department of Labor, Bulletin No. 56, *Workmen's Compensation: An Outline of Legislation in the United States and Territories as of January 1, 1943*, p. 1. As with the New York law, most of these statutes provide for the assignment to the employer of the injured workman's cause of action against a third party tortfeasor, where the workman accepts compensation, but some give both the employer and the employee a right of action, occasionally without provision for joinder. Moreover, the claims of persons entitled to the benefits of these workmen's compensation statutes are subject to a variety of provisions relating to the fixing of attorney fees and limiting the right of the claimant to compromise and settle his claim, substantially all of which will conflict with the policy of Congress established in the Tort Claims Act.

On the other hand, the application of R. S. 3477 to bar such statutory assignments by state law will not in any way frustrate the fundamental public

policy of workmen's compensation legislation of protecting the injured employee, while still enabling compensation carriers to obtain indemnification from the United States when it is responsible for the injuries on account of which compensation has been paid. All compensation legislation contains protective provisions dealing with situations where recovery from the third party is effected by the employee who has accepted compensation. Thus, section 29, paragraph 1, of the New York Workmen's Compensation Law gives the insurance carrier a lien, to the extent of the compensation and medical expenses paid by it, on any recovery had in an action brought by the injured workman. Similar provisions, found in all compensation legislation, furnish ample protection for the indemnification of insurance carriers and cannot conflict with R. S. 3477, since they operate only after the amount of the Government's liability on the original claim has already been determined by proper proceedings, the Government's rights of offset exercised, and payment allowed by the General Accounting Office. See *Houston* v. *Ormes*, 252 U. S. 469, 474; *Price* v. *Forrest*, 173 U. S. 410. And if the injured workman should fail or refuse to bring an action, the insurance carrier is fully able to protect its derivative right under the state law by bringing action against the United States in the name of the workman. Cf. *Independent Wireless Co.* v. *Radio Corp.*, 269 U. S. 459; *Dole-*

man v. *Levine*, 295 U. S. 221, 225; *United States v. Hill*, 174 F. 2d 61 (C.A. 5).

We submit, therefore, that only the application of R. S. 3477 avoids conflict and confusion between the policies and incidents of the state workmen's compensation laws on the one hand and the protective statutes of Congress respecting collections and judgments against the United States on the other. We believe the court below erred in not applying R. S. 3477 and we invoke its application by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below erred in failing to apply R. S. 3477 to require suit to be brought in the name of the original claimant, and that the decision below should be reversed.

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SEPTEMBER 1949.

APPENDIX A

STATUTES INVOLVED

1. Sections 1346(b), 1346(c), 1402(b), 2674 and 2680 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. and amended by the Act of May 24, 1949, Public Law 72, 81st Cong., 1st Sess. [the provisions of the above sections having been formerly embraced in Section 410(a) and 411 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-844, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U. S. C. 931(a) and 932] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * *

28 U. S. C. 1402. *United States as defendant.*

* * * * *

(b) Any civil action ~~on~~ a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

* * * * *

28 U. S. C. 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. The Anti-assignment statute, R. S. 3477, as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203. *Assignments of Claims.*

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and exe-

cuted in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

* * * * *

3. The Offset statute (31 U.S.C. 71 and 227) provides:

31 U. S. C. 71. *Public accounts to be settled in General Accounting Office.*

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

31 U. S. C. 227. *Offsets against judgments against United States.*

When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered

against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been witheld from the plaintiff.

4. Subdivision 1, as amended by L. 1947, c. 9 and 144, and the pertinent provisions of Subdivision 2 of Section 29 of the New York Workmen's Compensation Law, are as follows:

Section 29. *Remedies of employees; subrogation.*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not

later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause

of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. * * *

APPENDIX B

Comptroller General of the United States

Washington

B-35182
B-60905

September 1, 1949.

The Honorable The Attorney General

My dear Mr. Attorney General:

This is in response to the informal inquiry of August 26, 1949, by your Department with respect

to the practice and procedure of the General Accounting Office in examining and settling claims, including judgments rendered against the United States, where a cross claim is found to be involved.

In furtherance of the duties imposed upon the General Accounting Office by 31 U. S. C. 71, 72, 93 and 227, and in view of the enactment of relief legislation relating to accountable officers or the inadequacy of their surety bonds to insure recovery, in proceedings under 31 U. S. C. 505, of large overpayments incident to Government transactions during the First World War for which credit had been disallowed or suspended in the official accounts of accountable officers, the Department of Justice (file 208677) suggested to the Comptroller General that "recoveries very greatly in excess of the cost might be realized by creating a small additional force" in the General Accounting Office "charged with the duty of collecting, as far as possible, all such suspended or disallowed items from the ultimate beneficiaries."

For purposes of convenience and practicability the special procedure thus suggested by the Attorney General was consolidated with the ordinary accounting procedure for collection of debts certified due by the General Accounting Office as outlined in the Annual Report of the General Accounting Office, 1923, House Document No. 101, 68th Congress, 1st Session, page 6; and, by Circular No. 10 of February 7, 1923, the Comptroller General established a collection unit whose functions included the keeping of a record of all debts owed to the United States incident to any transaction of any of its agents or agencies. By General Regulation No. 37 of July 7, 1924, 4 Comp. Gen. 1083, the collection

unit was transferred to the Claims Division of the General Accounting Office, so that its work was coordinated with the settlement and adjustment of claims by or against the United States or in which the Government is concerned either as debtor or creditor. General Regulation 50, Supplement 1, issued on April 4, 1934, 13 Comp. Gen. 491, provides that all Government departments and agencies will transmit to the General Accounting Office reports of any debts due to them or to the United States and the procedure so prescribed has ever since continued in effect.

Since this system was set up, whenever any claim is presented to the General Accounting Office and allowed, and it is found that the claimant is indebted to the United States in any amount, the certificate of settlement of the General Accounting Office directs that the amount due and allowed to the claimant be applied, to the extent required, to the payment of the debt due to the United States or any of its agencies, as shown by the debt records. If the amount due to the United States or its agencies is less than the amount due to the claimant, the certificate of settlement directs the issuance of two checks, one to the agency or official having custody or jurisdiction over the account to be credited with the amount of the debt, and the balance to the claimant. Such directions are uniformly observed by the Treasurer of the United States.

If the claim so presented to this Office is for payment of a judgment recovered against the United States under the Tort Claims Act, Public Vessels Act, Suits in Admiralty Act or Tucker Act, this Office proceeds in accordance with the require-

ments of 31 U. S. C. 227. Thus, should the plaintiff therein be indebted to the United States in any manner, whether as principal or surety, this Office must withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, this Office executes a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then this Office is required to withhold payment of such further amount of such judgment as in its opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it is then the duty of this Office to cause appropriate proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance is paid over to such plaintiff by this Office with six per centum interest thereon for the time it has been withheld from the plaintiff.

It goes without saying that the operation of this established procedure enjoined upon the General Accounting Office by 31 U. S. C. 227, together with other applicable statutes, and the long-continued approbation given by the Congress to the established claims procedure of the Office would be exposed to serious delay and confusion, if not defeated altogether, should judgments, contrary to

the requirements of the anti-assignment statute (R. S. 3477), be rendered in the name of plaintiffs other than the original claimants to whom the United States is indebted.

On the other hand, any form of judgment in accordance with the directions of the court in *United States* v. *Hill* (5th Cir., 1949), 174 F. 2d 61, modifying 171 F. 2d 404, whereby judgment is awarded to the original claimants, but with a direction whereby they are charged to pay out of their recoveries when received from the United States the various amounts to which their attorneys and their insurers may be entitled, is entirely workable and satisfactory to this Office. It appears that when such judgments are submitted to this Office for settlement, payment will be authorized to be made to the plaintiffs after appropriate action under 31 U. S. C. 227, it being understood that thereafter the plaintiffs will themselves make payments to the attorneys and insurance companies as required by the terms of the payments.

Sincerely yours,

/s/ Lindsay C. Warren,
Comptroller General
of the United States.

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